

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Acceleration of Broadband Deployment:)	
Expanding the Reach and Reducing the Cost of)	
Broadband Deployment by Improving Policies)	WC Docket No. 11-59
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	

COMMENTS OF SUNESYS, LLC

INTRODUCTION AND SUMMARY

Sunesys, LLC (“Sunesys”) hereby submits its comments in response to the Notice of Inquiry (the “Notice”) in the above captioned proceeding.

Sunesys is a leading provider of non-switched, digital fiber-optic communications networks capable of providing broadband services. Sunesys’ customers include large commercial, non-profit, and government entities. As a competitive service provider certified to provide telecommunications services in numerous states, Sunesys is familiar with the laws and regulations governing access to public rights of way, and the practices of numerous localities in response to Sunesys’ requests for timely, reasonable and nondiscriminatory access to the public rights of way.

For the reasons discussed herein, the Commission should commence a rulemaking to adopt rules that will clarify the rights of the parties when providers seek access to public rights of way, including with respect to the matters discussed below. Given the critical importance of broadband deployment to the future of this country, and the need

for broadband providers to have access to governmental rights of way on a timely basis and at a reasonable cost, it is extremely important that disputes regarding access and fees be kept to a minimum. But that can only occur if the law under 47 U.S.C. § 253 (“Section 253”) is clarified on the fundamental issues discussed herein. Without such clarifications, these issues will be litigated time and time again, to the benefit of no one – and to the tremendous detriment of broadband consumers and the Commission’s goal of broadband deployment. There is no upside whatsoever to having these fundamental issues continue to be left unresolved – fifteen years after the passage of the 1996 Act. The time to address these matters, and clarify the law, is now, and thus a rulemaking should be promptly commenced. Uncertainty only discourages investment, creates additional delay, and forces providers to expend significant resources on litigation and dispute resolution, rather than on broadband deployment itself.

DISCUSSION

I. Several Substantive Issues Relating to Public Rights of Way

In the Notice, the Commission seeks comment regarding, among other things, (i) the timeliness and ease of gaining access to public rights of way; (ii) the reasonableness of the charges for the public rights of way; and (iii) whether discriminatory treatment with respect to access and rates in this area is occurring.¹

A. Timeliness and Ease of Gaining Access to Public Rights of Way

The responsiveness of local governments to Sunesys’ request for access to public rights of way varies tremendously. Some respond quickly, and access is granted within just a few weeks. Others are at the other end of the spectrum, taking enormous

¹ Notice at par. 12.

amounts of time to process applications and to provide access, with the process sometimes taking longer than a year. Some local governments even resist construction of additional networks at all, claiming, for example, that there are aesthetic reasons why 11 cables on a pole is absolutely fine, but 12 is a complete eyesore.

One way to speed up the deployment of broadband is to impose a timeline for the issuance of permits for public rights of way access. One reason delays occur is that local governments do not have a fixed deadline in which they need to comply, and as a result many take far longer than needed.

B. Charges for Use of Public Rights of Way

The charges local governments seek to impose on Sunesys for use of rights of way also vary tremendously. Some impose reasonable charges that appear to be equivalent to their costs or little more. Others seek to impose franchise-like fees -- 3% to 5% of the revenue received by the provider in that jurisdiction -- which fees bear no relationship whatsoever to the extent of the use of the rights of way or the cost of providing access.² That is, the same charges apply regardless of the amount of right of way occupied, which can vary from a few feet to many miles.

Such significant charges can discourage broadband deployment, and may not be consistent with Section 253. Moreover, such high rates do not reflect the “market” for one simple reason: there is no market. Ordinarily, there are no other options for providers other than to use the local rights of way in connection with the provision of broadband services.

² There is also uncertainty, when such fees are imposed, of how a provider should calculate which portion of its revenues applies to the rights of way used in such jurisdiction.

C. Discrimination with Respect to Rates and Access

In some jurisdictions, the discrimination regarding the rates for access to the public rights of way could not be more stark. In those jurisdictions, while CLEC's pay a percentage of their revenues for the right to receive access, ILECs pay nothing at all. Discrimination clearly exists in these instances. In fact, discrimination likely exists whenever two competitors are charged different rates for access based on different formulas.

Discrimination also exists where local governments impose far greater limitations on one group of providers' access as compared to another. Some jurisdictions, for example, require new providers to install their facilities underground while continuing to permit existing providers to install their facilities on poles, which is far less expensive. Such discrimination cannot be justified, and it is extremely detrimental to broadband competition.

II. The Commission Should Initiate a Rulemaking to Adopt Rules Clarifying the Meaning of Section 253

In the Notice, the Commission asks whether it should initiate a rulemaking to adopt rules to clarify the meaning of Section 253.³ The answer is a resounding yes.

Rules are unquestionably needed here. Disputes regarding access to public rights of way greatly delay and undermine the deployment of broadband services. As the Commission has stated on numerous occasions, (1) broadband deployment is critical to the future of this country; and (2) timely and reasonably priced access to necessary

³ Id. at par. 10.

governmental rights of way is critical to broadband deployment.⁴ Thus, disputes regarding access to, and charges for, use of the public rights of way can delay or even derail broadband deployment, thereby undermining the Commission's goals and the public's interests.

Moreover, the case by case approach of resolving Section 253 disputes does not work very well because there are tremendous disagreements as to fundamental issues concerning the proper interpretation of the law, which cannot be definitely resolved by case law, which only is controlling as to the particular jurisdiction involved. These disagreements concern, among other things, issues relating to (i) how long a local government should be given to grant access to its public rights of way, and whether a timeline should be instituted; (ii) the appropriate limits on charges for access to the rights of way; (iii) whether discriminatory fees and discriminatory access restrictions are permissible at all, and, if so, under what limited circumstances; (iv) the appropriate standard under Section 253(a); (v) the permissible scope of local governments' rights of way management; and (vi) the extent of the Commission's authority under Section 253.

A. Whether a Timeline is Needed

Given the concerns referenced in Section I(A) above regarding the failure of many local governments to timely provide access to public rights of way, the Commission should initiate a rulemaking to determine whether to adopt rules imposing a timeline. In many instances in the telecommunications field, the Commission has concluded that without a timeline to perform an act, a party may simply delay the process to the detriment of broadband deployment and competition. As a result, over the past

⁴ E.g., id. at pars. 1, 4.

several years the Commission has adopted timelines in several other proceedings, including proceedings involving pole attachments, wireless facilities, and cable franchises.

B. Whether Local Governments are Permitted to Charge Providers More than the Authority's Costs for Use of the Rights of Way, and if so What are the Limits on the Charges

The law is unsettled as to whether local governments can charge only their costs for use of their rights of way, or whether they can make a profit on such use, and if they can make a profit, what are the limits on their charges (for example, can a locality charge a percentage of the provider's revenues or are such charges limited to a cost-based formula, such as cost plus a reasonable administrative fee). It is surprising that 15 years after the adoption of the 1996 Act, the cost issue still has not been definitely resolved. The time for that issue to be resolved has clearly arrived.

C. Whether Fees or Access Restrictions that Are Discriminatory Automatically Violate Section 253

There appears to be significant disagreement as to whether discriminatory fees and access restrictions automatically violate Section 253, or whether there are limited exceptions under which such discrimination is permitted. This fundamental issue needs to be resolved as well, as it is axiomatic that discriminatory fees and access restrictions, including those discussed by Sunesys in Section 1(C) above, greatly undermine broadband deployment and competition. When the playing field is unlevel, it is extremely difficult to compete.

D. Whether Governmental Conduct that Materially Inhibits or Limits the Ability of any Competitor or Potential Competitor to Compete in a Fair and Balanced Legal and Regulatory Environment Constitutes a Violation of Section 253(a)

The Commission has repeatedly interpreted Section 253(a)⁵ to bar any regulation that “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment,”⁶ and many courts agree with the Commission as to this construction of the law.⁷ As a result of this interpretation, the Commission has taken a common sense -- and pro-deployment -- approach and struck down (or cast doubt over) a number of legal requirements that did not literally prevent a provider from providing service.⁸

However, a Ninth Circuit case, *Time Warner Telecom of Oregon, LLC v. City of Portland*, has added to the confusion regarding the proper interpretation of Section 253(a), as the court in *Time Warner* held that Section 253(a) was not violated because the provider was continuing to operate and was thus not completely barred from providing

⁵ Section 253(a) provides that “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”

⁶ See Memorandum Opinion and Order, *California Payphone Association*, 12 FCC Rcd 14191, ¶ 38 (1997) (“*California Payphone Assoc. Order*”); *PUC of Texas Order* ¶ 22; Memorandum Opinion and Order, *CI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, ¶ 106 (1997) (“*TCI Order*”) ¶ 98.

⁷ *Level 3 Communications v. City of St. Louis*, 477 F.3d 528, 533 (8th Cir. 2007) (a requirement that materially interferes with a carrier’s ability to compete in a fair and balanced market violates Section 253(a)); *P.R. Tel. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (same); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (citing *California Payphone Assoc. Order*); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004).

⁸ See, e.g., *PUC of Texas Order*, ¶¶ 74-75 (Commission ruled that Section 253 preempted a state law requirement that new local telecommunications companies must use some facilities not owned by the incumbent); Memorandum Opinion and Order, *Petition of the State of Minnesota*, 14 FCC Rcd 21697, ¶ 22 (1999) (“*Minnesota Order*”) (Commission raised doubt over validity of an agreement providing a developer with exclusive access to certain rights of way alongside a highway, because the agreement could harm facilities-based providers, as the evidence indicates that rights of way other than the highway rights-of-way would be substantially more expensive); *Western Wireless Corporation*, 15 FCC Rcd 16227 ¶¶ 7, 8(2000) (Commission stated that a universal funding mechanism that only benefited incumbent LECs would likely violate Section 253(a)); *TCI Order*, ¶ 105 (Commission expressed concern regarding validity of provisions that required “franchisees to interconnect with other telecommunications systems in the city for the purposes of facilitating universal service, provide[d] for regulation of the fees charged for interconnection, and mandate[d] ‘most favored nation’ treatment for the [municipality].”).

service.⁹ That case is directly at odds with the Commission's prior holdings. Clearly, this issue needs to be clarified once and for all as it directly impacts the extent to which local laws are permitted to detrimentally undermine broadband deployment.

E. Whether the Scope of Local Governments' Rights of Way Management is Limited to the Items Listed in the Commission's Prior Orders, and, if not, What are the Limits

In the TCI Order, the Commission held that appropriate rights of way management included "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them."¹⁰ Similarly, in *In re Classic Telephone*, the Commission found that the legislative history sheds light on permissible rights of way management functions under section 253, as the Commission stated as follows:

During the Senate floor debate on section 253(c), Senator Feinstein offered examples of the types of restrictions that Congress intended to permit under section 253(c), including State and local legal requirements that: (1) regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts; (2) require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies; (3) require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation; (4) enforce local zoning regulations; and (5) require a company to indemnify the City against any claims of injury arising from the company's excavation.¹¹

Notwithstanding these FCC Orders, local governments today often overreach with respect to their rights of way management, and in numerous instances such efforts have been struck down by the courts, including in the following circumstances:

⁹ *Time Warner Telecom of Oregon, LLC v. City of Portland*, 322 Fed. Appx. 496 (9th Cir. 2009).

¹⁰ TCI Order ¶ 103.

¹¹ *In re Classic Telephone*, 11 FCC Rcd 13082, 13019 ¶ 39 (1996).

- Requirements that a provider supply extra capacity for the municipality.
- Laws that provide local governments with virtually unlimited discretion with respect to whether to grant access to rights of way.
- Laws providing a local government with virtually unlimited discretion with respect to removal rights (with regard to the providers' facilities) after access has been granted.¹²

The Commission should also confirm not only which types of regulations are permissible, but also when they may be challenged. That is, the Commission should confirm that laws that govern initial entry can be challenged before they have any harmful effect.

F. Whether the Commission Has the Authority to Preempt Conduct under Section 253 Where a Local Government Seeks to Raise a Defense under Section 253(b) or (c)

Providers believe that the Commission has the power to decide whether to preempt local governmental action under Section 253, even where a local governmental entity claims that its action is protected under Section 253(b) or (c).¹³ On the other hand, local governments argue that if they raise a defense under Section 253(b) or (c), the Commission is powerless to decide the issue, and only a court can address it.¹⁴ Of course, knowing what is the proper forum for the resolution of Section 253 disputes is critical to addressing any of the above issues in contention, and thus this area of disagreement must also be resolved.

¹² See Comments of AT&T Inc., WC Docket No. 9-153 (October 15, 2009) ("AT&T Comments") at 5 & n. 9, 11 and 13.

¹³ See AT&T Comments at 14, 18; Comments of Verizon and Verizon Wireless, WC Docket No. 09-153 (October 15, 2009) at 13-15.

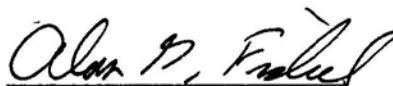
¹⁴ See, e.g., Comments of the City of New York, WC Docket No. 09-153 (October 15, 2009) at 14-19; Comments of the City of New York, WC Docket No. 09-153 (October 15, 2009) at 1-7.

CONCLUSION

For all of the foregoing reasons, the Commission should commence a rulemaking on the issues addressed herein.

Respectfully submitted,

SUNESYS, LLC

A handwritten signature in black ink, appearing to read "Alan G. Fishel".

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